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FILED

IN THE UNITED STATES COURT OF APPEALS AUG 1 [illegible]

FOR THE NINTH CIRCUIT

[illegible] WINBERRY
[illegible] OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEROME FORTENBERRY, JR., MORTON E. STRAIN, and EDUWIJES SARABIA ESTRADA,

Defendants-Appellants.

NOS. 81-1551, 81-1556, 81-1561

DC # CR-81-0379-1, CR-81-0379-4, CW-81-0379-1 MRR

MEMORANDUM

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
HON. WILLIAM B. ENRIGHT, DISTRICT JUDGE, PRESIDING

SUBMITTED JUNE 7, 1982

Before: FARRIS and CANBY, Circuit Judges, and WHELAN, District Judge*.

Appellants Jerome Fortenberry, Jr., Morton E. Strain, and Eduwijes Estrada appeal their convictions following a jury trial where each of the three defendants was found guilty of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and theft of government property having a value in excess of $100, in violation of 18 U.S.C. § 641. The three cases were consolidated for appeal.

FORTENBERRY APPEAL

Jerome Fortenberry's contention on appeal, that there was insufficient evidence of his knowing participation in the conspiracy, is without merit. The evidence showed that: Fortenberry assisted Estrada in transporting and concealing high-value items among low-value items in bins that were normally used for low-value items; Fortenberry assisted in loading Strain's truck with the stolen goods on August 14, 1980; and Fortenberry first lied to the FBI and later admitted his participation in the loading only when confronted with a film of his actions. A tape recording

* Honorable Francis C. Whelan, Senior United States District Judge for the Central District of California, sitting by designation.

Appendix A

of a conversation between Fortenberry and Avila, the Government's witness, revealed that Fortenberry was a co-conspirator: Fortenberry discussed the bribe he was to receive, the hiding of high-value items among low-value items, and the identity of the informant in the scrapyard. The film of Fortenberry's actions, the tape of his conversation, and the testimony of several witnesses constituted more than enough evidence for a jury to reasonably conclude that Fortenberry was a knowing participant in the conspiracy. See Glasser v. United States, 315 U.S. 60, 80 (1942).

STRAIN APPEAL

Appellant Morton Strain contends he was denied a fair trial because: 1) the Court did not permit counsel to voir dire the jury; 2) the Court restricted cross-examination of the Government's expert witness; and 3) closing argument of the prosecution was unsupported by the evidence. The Court denied Appellant's request to voir dire the jury and conducted voir dire itself, asking questions about the relationship of the jurors to law enforcement and the ability to be impartial. When one juror later mentioned a possible connection to law enforcement, the judge allowed defense counsel to question the juror, who was then dismissed. The manner in which voir dire is conducted is largely within the discretion of the trial judge, United States v. Giese, 597 F.2d 1170 (9th Cir.), cert. denied, 444 U.S. 979 (1979), and there is no abuse of discretion merely because the Court conducts voir dire on its own rather than permitting counsel to do so. United States v. Pimentel, 654 F.2d 538 (9th Cir. 1981); United States v. Rosales-Lopez, 617 F.2d 1349 (9th Cir. 1980), aff'd, 451 U.S. 182. Appellant has shown no abuse of the Court's discretion here.

Strain's contention that he was denied a fair trial because the Court restricted cross-examination of the Government's

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expert witness is also without merit. The Court's admonition to Strain's attorney to refrain from asking a repetitive series of questions was not error. It is within the Court's discretion to restrict repetitive cross-examination, United States v. Salsedo, 607 F.2d 318, 321 (9th Cir. 1979), and to prevent cross-examination from unduly burdening the record with cumulative matters, United States v. Weiner, 578 F.2d 757, 766 (9th Cir.), cert. denied, 439 U.S. 981 (1978).

The prosecution, in its closing argument, argued from the evidence that Strain intended to sell the jet engines for their component parts and that there existed probable markets for such parts. A reasonable inference supported by the evidence is acceptable in closing argument. United States v. Marques, 600 F.2d 742, 749 (9th Cir. 1979), cert. denied, 444 U.S. 1019 (1980). As for the statement that the government had been after Strain for years, Strain's own attorney conceded as much in his final argument, and the evidence indicated that Strain had been suspected of theft at least several months before his arrest. Any improprieties in the prosecutor's closing argument must be so gross as to probably prejudice the defendant in order to constitute the grounds for a new trial. United States v. Potter, 616 F.2d 384, 392 (9th Cir. 1979), cert. denied, 449 U.S. 832 (1980). That is clearly not the case here; furthermore, Appellant made no objection to the closing argument at the time, and thus he has failed to meet the heavy burden of showing plain error. United States v. Giese, 597 F.2d 1170 (9th Cir.), cert. denied, 444 U.S. [illegible] (1979)

ESTRADA APPEAL

Appellant Eduwijes Estrada contends he was denied a fair trial because of prosecutorial misconduct in three areas and because the Government failed to introduce competent evidence on the issue of value. First, the Government's display of the stolen

property against a backdrop of legitimately sold property, where the distinction between the two was made clear to the jury, was not misleading and did not constitute error. Second, there was simply no evidence to show that the Government had any more information than the Appellant regarding pending litigation that Appellant claimed showed the economic unfeasibility of recovering precious metals from the stolen electronic circuit cards. Third, the Government's attempt to introduce into evidence a silver ingot, which was produced by melting down the type of wiring described in the assay reports (both of which were received into evidence without objection), did not constitute an attempt to introduce improper evidence. No curative instruction was requested, and the mere offer to introduce the ingot was not plain error.

Title 18 U.S.C. § 641 requires that the Government show the value of the stolen property is in excess of $100. The Government's expert witness satisfied the trial court that he was an expert in the identification, valuation, and disposition of government property; and his testimony showed that the total value of the property on Strain's truck was nearly $97,000. Even allowing for a substantial margin of error, it is clear that the Government established a value for the stolen property, beyond the value of the bid at $12,000, well in excess of $100. Estrada's contention that the Government's evidence on the issue of value was either incompetent or insufficient is thus without merit.

The convictions are affirmed.

FILED

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CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Petitioner, v. JEROME FORTENBERRY, JR., MORTON E. STRAIN, and EDUWIJES SARABIA ESTRADA, Respondents.	)	Nos. 81-1531, 81-1536, 81-1561 ORDER

Before: FARRIS and CANBY, Circuit Judges, and WHELAN, District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing filed by appellant Strain. Judge Farris and Judge Canby have voted to reject the suggestion for rehearing en banc and Judge Whelan so recommends.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

Strain's petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appellant Estrada's application for leave to file late petition for rehearing is granted.

Estrada's petition for rehearing is denied.

*Honorable Francis C. Whelan, Senior United States District Judge for the Central District of California, sitting by designation.

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Appendix B

DECLARATION OF SERVICE BY MAIL

I, J. KENNETH JENSEN, being first duly sworn, deposes and says:

I hereby certify that on February 10th, 1983 a copy of this petition for a Writ of Certiorari was mailed, postage prepaid, to the following:

Solicitor General
Department of Justice
Washington, D.C 20530

I further certify that all parties required to be served have been served.

J. KENNETH JENSEN
Attorney for Petitioner

Duly witnessed and sworn before me this 10th day of February, 1983.

NOTARY PUBLIC

OFFICIAL SEAL
DIANNE GOTFREDSON
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires April 25, 1983